Parkview Lounge, LLC d/b/a Ascent Lounge *and* Susann Davis. Case 02–CA–178531

April 26, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

The issue presented in this case is whether the Respondent violated Section 8(a)(1) of the National Labor Relations Act by discharging the Charging Party, Susann Davis, in response to her engaging in protected concerted activity when she vocally discussed workplace concerns at a staff meeting. The administrative law judge found that the Respondent unlawfully terminated Davis for voicing group complaints about employee wages, benefits, and working conditions. We affirm the judge's findings for the reasons discussed below.[1]

I.

The Respondent is a limited liability company engaged in the sale of alcoholic beverages and food in New York, New York. Susann Davis began employment with the Respondent in June of 2015 and worked as a cocktail server. Davis was generally considered to be very good at her job, with only one documented incidence of discipline: a written warning on November 3, 2015, for paying insufficient attention to the customers at some of her tables. The general manager who issued the warning, Geoffrey Daley, conceded that Davis' table service improved after she received the warning.

At times, Davis had a contentious relationship with some members of the Respondent's management team. Davis and a fellow employee, Elizabeth Pinzon, had previously spoken with other employees about their concerns over the heavy-handed management approach of their assistant manager, Jonathan Torres. On December 3, Davis ignored instructions given to her by Torres, because she believed that they conflicted with instructions given to her by Daley. Torres took her off the lounge floor, and Davis emailed the Respondent's operating owner, Brian Packin, to express her concerns. As Davis clocked out, she purportedly said that she "wished [Torres] death." The Respondent was aware that other employees also had a problem with Torres' management style, and he was soon thereafter moved to another facility owned by the Respondent. Davis was never disciplined for this incident.

Instead, the circumstances that led to Davis' termination occurred in late January of 2016.[2] On January 15, Davis received permission from Daley to take a 10 to 15-minute break during a party event. While on her break, Floor Manager Natlya Aksentyeva entered the break room and chastised Davis for using her phone during the break rather than eating. Davis replied that she could do as she wished during her break.

On January 22, Packin held a meeting with Davis, Daley, and Aksentyeva to discuss the January 15 event. At the meeting, Packin stated that he knew Davis had concerns with the way managers had spoken to employees in the past, and he did not want her concerns to "bleed out to other staff members of the team" or have them "hearing about it because that doesn't make you look good or us look good." Instead, he advised Davis to "handle things internally." However, the Respondent subsequently praised Davis' work performance during the meeting. Packin assured Davis that Aksentyeva had spoken highly of her in the past, saying, "I feel like I have a great team tonight. I've got Susann [Davis] on the team" and that Aksentyeva felt comfortable pairing employees with Davis to have her train them. Finally, Packin assured Davis during the meeting that her job was not at stake. Aksentyeva ended the meeting by telling Davis, "You are doing a great job on the floor . . . ."

Five days after this meeting, on January 27, Daley and Manager Ray Quiñones held an all-staff meeting with the Respondent's employees. At the meeting, Davis vocally raised a number of concerns affecting employees at the Respondent's facility. Davis voiced concerns about the Respondent's oncall scheduling system, failure to provide certain workplace benefits, recent decrease in pay rate during parties, and the uncomfortable working conditions and uniforms imposed on servers. Other servers at the meeting nodded their heads in approval as Davis voiced the various work issues. Quiñones told the assembled employees that he would relay all of these con-

[1] On September 22, 2017, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

[2] All dates hereinafter refer to 2016, unless otherwise noted.

cerns to Packin. Daley subsequently told Packin about the comments Davis made during the staff meeting.

Later that day, Davis met with Daley to voice her concerns over why her hours had been reduced the previous week. She documented the meeting in a followup email, which she sent to Daley on January 28. Daley forwarded the email to Packin, and informed Packin that Davis wanted to speak with him. When they next spoke, 2 days after the January 27 staff meeting, Packin informed Davis that she was terminated.

II.

Applying the Board's *Wright Line* analysis, the judge found that the Respondent violated Section 8(a)(1) by terminating Davis in response to her protected concerted activity during the January 27 staff meeting. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). In support of that showing, the judge determined that Davis engaged in protected concerted activity by voicing group concerns at the January 27 meeting, that the Respondent knew of such activity, and that the Respondent held animus towards such activity. *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). The judge found that the Respondent's proffered reason for termination, Davis' difficulty getting along with management, was pretextual. Accordingly, the judge concluded that the Respondent was unable to prove that it would have terminated Davis in the absence of her protected concerted activity. See, e.g., *Coastal Sunbelt Produce*, 362 NLRB No. 126, slip op. at 2 (2015). In its exceptions, the Respondent argues that the General Counsel failed to prove that the Respondent had knowledge of or animus towards Davis' protected concerted activity.

III.

We agree with the judge that the Respondent violated Section 8(a)(1) by terminating Davis in response to her raising group workplace concerns during the January 27 staff meeting. To support his initial burden under *Wright Line*, "the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the adverse employment action." *Consolidated Bus Transit, Inc.*, 350 NLRB at 1065. The elements commonly required to support such a showing are protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. Id.

Here, it is uncontested that Davis was engaged in protected concerted activity when she voiced a number of group workplace concerns during the January 27 staff meeting, which were met by nods of approval from the assembled employees. Next, we adopt the judge's finding that Packin had knowledge of Davis' protected concerted activity when he made the decision to terminate her. Davis' manager, Daley, had attended the staff meeting, and had briefed Packin about Davis' comments made during the meeting just 2 days before Packin decided to discharge her.

Further, we adopt the judge's finding that the Respondent held animus towards Davis' speaking out at the January 27 meeting. First, the judge was correct to determine that the suspicious timing of the discharge, just 2 days after Davis engaged in protected concerted activity, was evidence of animus. *McClendon Electrical Services*, 340 NLRB 613, 613 & fn. 6 (2003) (finding discharge that occurred a day after protected concerted activity supported a finding of unlawful motivation); *Mira-Pak, Inc.*, 147 NLRB 1075, 1081 (1964), enfd. 354 F.2d 525 (5th Cir. 1965) (finding termination unlawful where discharge occurred 2 days after protected concerted activity). Second, as the judge found, the Respondent's proffered reason for terminating Davis, her inability to work with management, was pretextual. The judge credited Davis' testimony that Packin did not inform her during the January 29 meeting that she was being terminated for any service or performance issues. The judge discredited Packin's contrary testimony. Further, although the Respondent listed performance issues as a reason for termination in its official report to the New York State Department of Labor, we note that just a week before her termination, Packin and Aksentyeva praised Davis' work performance, and Packin assured Davis during that meeting that her job was not at stake. These inconsistent and shifting reasons for discipline support the judge's finding that the Respondent's proffered reason for the termination was pretextual. See *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) ("Where . . . an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive."), enfd. 165 F.3d 32 (7th Cir. 1998) (unpublished table decision), and published in full 160 F.3d 353 (7th Cir. 1998); *Lucky Cab Co.*, 360 NLRB 271, 274–275 (2014) (noting that "improbable" and "implausible" reasons offered by the employer, as well as shifting explanations, supported the judge's findings that employer's reasons for discharge were pretextual).[3]

[3] On exception, the Respondent argues that it terminated Davis because her conduct, including the January 28 email, evidenced her inability and unwillingness to work with management. In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by terminating

Because we adopt the judge's determination that the Respondent's proffered reason for terminating Davis was pretextual, we find it unnecessary to proceed to the second step of the *Wright Line* analysis, which is only applicable in mixed-motive cases. *K-Air Corp.*, 360 NLRB 143, 144 (2014); *Rood Trucking Co.*, 342 NLRB 895, 898 (2004). Accordingly, we affirm the judge's finding that the Respondent violated Section 8(a)(1) of the Act by discharging Davis for engaging in protected concerted activity.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Parkview Lounge, LCC, d/b/a Ascent Lounge, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. April 26, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Zachary E. Herlands, Esq., for the General Counsel.
Ariadne Panagopoulou, Esq. (Paradalis & Nohavica, LLP), for the Respondent.
Siobhan Klassen, Esq. (Law Office of Andrea Paparella, PLLC), for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in New York, New York, on August 1–2, 2017. Susann Davis, a former employee of Parkview Lounge LLC d/b/a Ascent Lounge (Parkview) alleges that Parkview violated Section 8(a)(1) of the National Labor Relations Act[1] by terminating her on January 29, 2016,[2] because she complained about her wages, benefits, scheduling, uniforms, footwear, schedules, transit benefits and management's treatment of employees. Parkview concedes that Davis engaged in protected activity under the Act, but denies that such activity was in concert with, or on behalf of, other employees. Moreover, Parkview denies that Davis was terminated because of her protected conduct and attributes the discharge to her persistently abusive behavior towards management and others.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party, and Parkview, I make the following

FINDINGS OF FACT

I. JURISDICTION

Parkview, a New York limited liability company, is engaged in the retail sale of alcoholic beverages and food at the Time Warner Center in Columbus Circle, New York, New York, where it annually derives gross revenues in excess of $500,000 from sales or performances of services, and purchases and receives goods valued in excess of $5000 from entities outside the State of New York. Parkview admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Parkview's Operations

Parkview, owned and operated by City Nights Hospitality, is a restaurant/lounge in the Time Warner Center at Columbus Circle in New York, New York. At its facility, which opened in June 2015, Parkview employs approximately 15 cocktail servers, as well as bartenders and bus boys. In addition to serving guests during business hours, Parkview holds private events and parties at which cocktail servers are scheduled to work in addition to regular shifts.

Brian Packin is the operating owner of Parkview, as well as 48 Lounge, another City Nights Hospitality owned establishment. At the relevant times, Parkview's cocktail servers were supervised by General Manager Geoffrey Daley, Assistant Manager Jonathan Torres, Floor Manager Natlya Aksentyeva and, on occasion, Ray Quiñones, 48 Lounge's manager.

Susann Davis was hired by Packin in June as a cocktail server. Davis was paid at the applicable minimum wage rate for service workers—$5 per hour plus tips during 2015 and $7.50 plus tips in 2016. She was also paid at an hourly rate of $50 per hour during private events; this hourly rate was lowered to $40 per hour in early 2016.

B. Davis' Positive Relationship with Management Early On

Early on, Davis' relationship with Parkview management was a positive one. Packin was approachable and amenable to

Davis, we do not hold that an employer is generally precluded from discharging an employee for such conduct. Instead, we agree with the judge that in this instance, the record supports the conclusion that Davis' purported inability to work with management was not the true reason for her discharge.

[4] We do not rely on the judge's finding that Davis' December 3, 2015 conduct, in which she "wished death" upon Torres, was protected concerted activity under *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

[1] 29 U.S.C. §§ 151–169.

[2] All dates are from June 2015 to May 2016 unless otherwise indicated.

listening and addressing employee concerns.[3] During her employment by Parkview, Davis communicated on several occasions with Packin, Daley and other managers. With the exception of one written warning on November 4, supervisors and management considered her to be very good at her job.[4] Not surprisingly, on October 2, Davis emailed Packin seeking a larger role in the operation:

> Thank you for giving me the opportunity in being a part of the Parkview team and family as I like to call it. I truly enjoy working with my colleagues and respect the integral role I and everyone play in improving the Park View brand. I hope in the near future I will have the opportunity to sit with you and discuss the possibility of taking on a more integral role in shifting the brand to new heights. I have little experience in event planning but would love to advance in that field if such an opportunity should arise . . . However, I'm happy to take on a more administrative or operational role since most of my experience lies there. Thanks in advance and I look forward to meeting with you. Have a great day.

Packin responded the following day, thanked Davis for reaching out, expressed interest in discussing other opportunities and looked forward to meeting the following week. Davis responded by thanking Packin.[5]

C. Davis Discusses Work Issues with Coworkers and Supervisors

At or around the same time that she expressed interest in a broader role at Parkview, Davis and another cocktail server, Elizabeth Pinzon, began discussing wages, hours, benefits, and other conditions of employment with coworkers Rachel Greene and Kristy Pradez. These discussions took place during and after shifts in the serving areas and employee locker rooms. An initial concern was the cold room temperature in Parkview. They also discussed other concerns, including the short skirt uniforms and uncomfortable heels worn by the cocktail servers, receiving no pay for time required to be on-call for work, and a decrease in the party/event hourly wage rate from $50 to $40 per hour. In addition to concern over the reduction of the party work hourly rate, Davis and Pinzon also took issue with Parkview's refusal to pay that rate for the time it took to set-up and clean-up for private or party events. Davis also spoke with coworkers about having Parkview provide employees with healthcare benefits and facilitate state-subsidized mass transit incentives. Finally, Davis and Pinzon also spoke to coworkers about what they perceived as Torres' heavy handed management approach.[6]

D. Davis' Relationship with Supervisors and Coworkers

Torres, initially hired as a server's assistant before being promoted to assistant manager, had problems with several servers, including Davis. Due to his managerial style and resentment to his elevation, including doubts about his qualifications, Torres moved over to 48 Lounge by December. Davis' first documented encounter with Torres occurred on October 22, when he noticed drinks on the server stand. As Davis and Rachel Green stood next to the stand talking, Torres asked what was going on. Davis responded in a nasty manner.[7] On another occasion, Davis was spending too much time at one table and Torres tapped her on the shoulder to let her know that there were other tables in need of attention.[8]

Davis' penchant for focusing on certain tables eventually led to disciplinary action. Initially, Davis had a good social and working relationship with Daley and, at various times in 2015, she shared her concerns about the cold air temperature, party pay, and servers' uniforms.[9] The social aspect of their relationship diminished after Daley issued a written warning to Davis for talking excessively to customers at one table on November 3, while neglecting customers at other tables in her section. He also noted that this had been going on "over time." Davis was instructed to refrain from such conduct or face a possible suspension. Thereafter, Davis's table service improved.[10]

In the meantime, Torres' relationship with Davis continued to deteriorate. In his sales report to Packin for November 18, Torres stated that "the servers did a great job of selling food tonight." He also included comments about the performance of several servers, all positive, except for Davis: "[Susanne's] relationship with many of the workers is slowly deteriorating. If she doesn't like someone she definitely lets it show when she is communicating with them."[11]

On December 3, Davis ignored an instruction by Torres that she considered contradictory to one given by Daley. In response, Torres removed Davis from the floor. Davis became angry and emailed Packin with a request to meet to discuss her concerns:

> If you don't mind, I would like to meet with you and discuss

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[3] I received, but did not give any weight to, evidence that Packin helped out another employee, Katia Lopes, in March 2017 with a $1000 loan for her brother's surgery. Such postdated evidence is irrelevant. (R. Exh. 11; Tr. 329–333.) Nevertheless, it is not disputed that Packin was approachable and generally fostered good relationships with Parkview's employees.

[4] Daley, Torres, and Packin all respected Davis' abilities. (Tr. 30, 147, 196; R. Exh. 4.)

[5] GC Exh. 7.

[6] I base this finding on the credible and undisputed testimony of Davis and Pinzon. (Tr. 20–25, 101-105, 114–117, 123, 127–128, 140.)

[7] R. Exh. 4.

[8] I have no doubt that Davis resented being ordered around by Torres, a former busboy. However, Torres corroborated Davis' testimony, as well as that of Pinzon, a very credible witness still employed by Parkview, that Padez, Greene, and Pinzon also had problems with his managerial style and he sought guidance from Packin. Indeed, management "knew there were going to be issues with [Torres] being a busser straight to supervisor." (Tr. 23, 128, 280–283, 296–299.)

[9] Daley and Torres confirmed, and Pinzon corroborated, Davis' testimony about these complaints. (Tr. 147–148, 193, 198, 290–291.)

[10] Daley was less than credible on this issue, initially confirming that Davis' table service improved, then denying it and, after being confronted with his prior sworn statement, conceding that she took better care of her tables after receiving the warning. (Tr. 194–196; GC Exh. 3.)

[11] With the exception of his negative relationship with Davis, I do not credit Torres' unsupported hearsay conclusions that her relationship with "many of the workers" was deteriorating. (R. Exh. 5.) The only coworker called to testify, Pinzon, certainly did not confirm that assertion.

> my concerns as a server. I am not suppose to leave work feeling disgust toward management and then be expected to have a huge smile on my face for service the next day. Especially when change seems impossible. My particular concern is with Jonathan who seems to think that his title demand respect. I have no issues with him being my manager if he is a competent one. He's egotistical and makes very poor decisions when it comes to protecting your brand.
>
> I am not the only one to have lashed out on him in front of other coworkers and I won't be the last if he continues to belittle everyone's position.
>
> I also can't imagine him saving the company any money or the employees having a chance to make good tips if he keeps 3 servers on the floor at 12 am when we close at 2 and then take up to 2 hours to close out each server.
>
> If I'm to continue, this email would go on forever. I'd rather discuss with you in person as I wish to work in a relatively productive and peaceful environment which will allow us to utilize our sales experience without losing our spirits and help to build the brand you aspire to be. Please let me know a time that's convenient for you. Cheers, Susann[12]

Packin responded less than 2 hours later, stating that he understood Davis' frustration, had a "game plan in place to improve all around," appreciated her "concern and dedication" to Parkview and was willing to meet with her to discuss the issues in order to "ensure our best chance to succeed in a happy and healthy working condition."[13]

Several hours later, Torres provided Packin with his version of the incident. Torres proceeded to detail Davis' outburst when he asked about one of her orders. He recounted that she told him to mind his own business, stop micromanaging her and screw himself. When he approached her later, he said Davis became irate, yelled at him and criticized his refusal to help out. As Davis clocked out, she "wished [Torres] death." He concluded the email with the following remark:

> She has whispered in too many peoples ears and influenced how some of them behave. She has been very aggressive with other staff. She is a strong server, but she refuses to do things to help us grow and better the brand.[14]

Davis also did not always see eye to eye with Matija Rajak, the lead bartender. On several occasions, she responded rudely or simply ignored Rajak whenever he commented on the way she was garnishing or pouring drinks. At no time, however, did Rajak request supervisory intervention in dealing with Davis. Moreover, Rajak's issues with the servers were not limited to Davis. On November 9, he emailed Packin complaining that Davis and other servers were not collecting checks within a reasonable period of time and, as a result, customers were going to the bar to pay their tabs. Rajak suggested that servers "should be checking the tables more often and pay more attention the customers."[15]

E. The January 22 Meeting

On January 15, Daley granted Davis' request to take a break during a party event. A short time later, Aksentyeva entered the break room and chastised Davis for using her cellular telephone instead of having something to eat. Davis replied that she could do as she wished during her break. On January 18, Aksentyeva informed Packin that she "had a conflict with Davis on [January 15], when she decided to take a 10–15 minute [break] in the middle of the event. I will deal with that and talk to her just want to keep you informed." Packin replied shortly thereafter, noting that Daley already informed him about the incident and "mentioned [Davis] was unruly and out of line. I would like to chat with you and see if a sit down with her will help or not far gone. Hoping she can be rehabilitated."[16]

On January 22, Davis met with Packin, Daley, and Aksentyeva to discuss the January 15th incident. Packin opened with a remark that he had hoped having "John" work less with Davis would alleviate the situation. He explained that staff needed to get along and supervisors needed "to feel they can manage you, give you constructive criticism and try and make the situation better. Packin said he wanted to handle things "internally" instead of hearing from Davis or staff through emails.

Davis gave her side of the story, explaining that Aksentyeva confronted her during a break about the fact that she was on her cell phone instead of eating food. After Davis told Aksentyeva that Daley approved her break, Aksentyeva went to get Daley. Packin responded that breaks are not usually authorized during parties. He also noted that, while Aksentyeva was a new manager and her role was evolving, he had not received complaints from other workers about her. Packin commented that "there is a lot of combativeness going on and this is something that [J]ohn said as well in fact and I don't know is it hard for you to take direction?" Davis' response indicated a willingness to take direction depending on what it entailed:

> Absolutely not. If I'm spoken to in a certain way, I don't disrespect anyone and the only reason why I reacted that way was because of the way [Aksentyeva] spoke to me and we're all adults and I don't think . . . I spoke to Geoff later on and apologized because I do respect Geoff as a manager I think he's doing an amazing job but I did say to Geoff as well, I said I'm still not going to take any crap from anybody because they think they're in a position."

Packin responded that several managers indicated they found

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[12] GC Exh. 4.

[13] GC Exh. 8.

[14] It is evident that Torres sent the email after Packin informed him about Davis' email complaining about the incident the night before. In any event, Davis was not disciplined and Torres was reassigned to 48 Lounge shortly thereafter. (R. Exh. 6; Tr. 256, 304.)

[15] The General Counsel moved to strike undisputed Rajak's testimony because an email confirming the tab collection problem was not produced previously pursuant to subpoena. I deferred a ruling until after briefing. (R. Exh. 9; Tr. 213–216, 395–402.) The motion is denied in part. The General Counsel was given an opportunity to recall Rajak, but declined. (Tr.401–402.) On the other hand, Rajak's testimony that he emailed Packin about other work problems presented by Davis is stricken. (Tr. 224–226.) Parkview's selective and untimely production of R. Exh. 9 warrant an inference that there were no other reports, emails or complaints about Davis. See Teamsters Local 776 (Pennsylvania Supply), 313 NLRB 1148, 1154 (1994).

[16] R. Exh. 2.

it difficult to give Davis constructive criticism. He added that Aksentyeva had always had good things to say about Davis, including assigning new servers to work alongside her. After a brief exchange about the incident, Davis expressed her belief that she was speaking out on behalf of other employees:

> But that was the only thing that has ever happened between me and [Aksentyeva] except for the fact that I've personally not just me but apparently I'm the only one in this company amongst the servers rather that speaks their mind and whenever I speak my mind I'm condemned for it and feel a bit unfair we all talked about things we don't liked together but when it is actually time to discuss it nobody says anything so maybe that's the reason why you're not hearing anyone saying.

Packin acknowledged Davis' concerns, sought to assure her that she could express her concerns when things were not going well, and asked if she said some things that were inappropriate. Davis denied saying that everyone hated Packin, but rather, that "everyone thinks the same." Packin asked Davis to elaborate. She responded with a long explanation of Aksentyeva's treatment of servers:

> Which is the way she delivers the message to the . . . we feel we are being patronized the way we're spoken to in a condescending way and we're all adults and even before I start a shift for example there was umm . . . [Aksentyeva] came back I think it was maybe 2 days afterwards and she asked to sit with me and didn't go well the after the 2nd time and I think it was a bad idea because I already assumed there was going to be a meeting between us to discuss it and this was before my shift and there's a possibility that it would not have gone well and now I have to go back on the floor in a not so good mood to deal with the clients and I just think that was a bad decision on her part she knows I disagreed with the way she approached me and then she disagreed with the way I responded.

Packin again acknowledged Aksentyeva's awareness of Davis' excellent customer service, but expressed the need for them to "grow from this experience" and "be able to operate well out there together," adding "I don't think anyone is saying your job you know is at stake here, her's isn't, yours isn't. If these things keep happening and happening and happening, I mean obviously you wouldn't want to work here and wouldn't be able to operate a business . . ."

Aksentyeva then gave her perspective, characterizing the incident as a misunderstanding and expressed her desire to have a normal working relationship with Davis. Davis acknowledged the need to respect each other, but insisted that Aksentyeva and Torres, as managers, sometimes spoke to the servers in a manner that was not respectful.

Packin responded that there were service situations which needed improvement, including Davis' tendency to focus on one table to the detriment of other tables. Davis replied that she had good communication and coordinated coverage of tables with Daley, with whom she usually worked. Packin replied that he expected Davis and Aksentyeva to work out their differences away from other employees and customers, and encouraged more sit-down meetings as needed. He opined that Davis was a "strong personality" who wanted "things done a certain way too . . . I don't expect for you guys to be life long pals but if she's going to be out on the floor I need to operate a business a certain way if it is not clicking with what you are doing I'm happy to sit down and talk about it. I'm sure you want to do the best job you can.

Aksentyeva concluded the meeting by apologizing to Davis. She stated that she never intended to disrespect Davis and respected her as a server: "You are doing a great job on the floor but I want you and I will tell it to everyone. . . . ."[17]

F. Davis Complains About Scheduling Changes

On January 25, Davis emailed Daley with concerns about changes in her work schedule that resulted after the January 22 meeting:

> After our meeting with Brian and Aksentyeva on January 22, 2016, I received my schedule and noticed the significant difference in the amount of days I usually get scheduled for. Being one of or if not, the most senior cocktail server there, I'm concerned as to why my days have been reduced. I looked at the schedule and noticed that there were other servers scheduled for 4 and 5 days. Servers not more senior than I. As a matter of fact, I was given the same amount of days as the most junior employees. My track record as a server at PVL in regards to hospitality and sales is of high standards therefore, I am a bit confused. During the holidays, I've put in a lot of hours at PVL and now that the season is over, there's a drastic change.

Daley responded the following day, initially denying that the meeting had anything to do with Davis' scheduling, but went on to say that he needed "to see changes and improvement in your service. We can talk more in detail on your next scheduled shift." Davis replied shortly thereafter, insisting she "had no idea that there was an issue with my service to Parkview clients and my work ethics as you've never asked to sit with me and talk about it. Your decision to cut my shifts without communicating this to me is unfair and affects my financial livelihood. I look forward to meeting with you to discuss this issue." Daley replied vaguely that he "made the schedule as I do every week to accommodate the needs of the business as well as adding additional staff into the schedule as well. I am in every day this week to discuss."[18]

G. The January 27th Staff Meeting

On January 27, Daley and Quiñones met with Parkview's staff and answered questions. Davis raised several concerns, which she recorded:

> . . . I have a few questions that has nothing to do with how you ah we work as a team. It's more . . . incentive. . . one of the things is "on call" we're not getting paid for it but yet

[17] Aksentyeva, although still in Parkview's employ, was not called as a witness. (GC Exh. 9 and 9(a).) Packin exhibited a selective memory about what he said to Davis during the January 22nd meeting, but conceded that he no intention of discharging Davis at this meeting. (Tr. 380.)

[18] GC Exh. 5.

> we're being required to call in to um so we pretty much waste our days. So is there anything that you guys as a management team can talk about and maybe correct the mistake on your part . . . basically?
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> The other part is there's a metro card incentive . . . where the state passed that the company will use a write off for their taxes if we get that, we get part of our metro card paid for, and also with medical, I just want to bring this to your attention cause I think as a team we should be able to get the benefits that companies offer.
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> Um and then um actually, one towards drinks to the bar . . . whenever we put an order in . . . let's say if for example you've got table 72 . . . and we've got like 15 ppl we put in 15 drinks now we're getting drinks that are made . . . for example, we order a vodka soda and then we order . . . Jamaican . . . mojito that sort of thing so we then order scotch on the rock we get those things first . . . made first and then they go and make the drinks that are specialty cocktails meanwhile those drinks are sitting, melting. So I think that's one of the issues that should be brought to their attention.
>
> . . . And the last is . . . there anything that you guys can do to make us more comfortable as servers being that it's always so . . . freezing cold in here and I understand that you have to accommodate your guests but even your guest complain about how cold it is in here especially the females. So is there anything that you guys can do to accommodate your guests and us . . . if you can't turn down the cold air . . . is there a possibility for us to wear a sweater because not only do we have to be . . . work 8 hours in heels, but we also have to deal with the cold while its cold outside. And I think that's a bit unfair to your employees. That's all I've got.[19]

Quiñones replied that he would report "everything" mentioned by employees at the meeting to Packin and "get back to you." A few minutes later, Davis asked Quiñones about private party pay, when it started and ended, including cleanup after parties. He replied that party pay reverted to the regular hourly wage rate when a party ended.[20]

After Davis' shift on January 27, she met with Daley to discuss why her hours had been reduced. The following morning, Davis documented the meeting in an email to Daley:

> After my shift last night we had a meeting and discussed your reason behind reducing my shifts. You mentioned:
> —You've asked me time and time again not to use the Servers Assistant as my personal butlers. That I'm constantly asking them to bring my tables water when I can easily do it myself.
> —Because I wasn't paying attention to my table, they walked out on the tab (happened 2 weeks ago)
> —I spoke poorly to Adderley (Servers Asst), Rachel (Cocktail Waitress) and Jonathan (Asst. Manager/Servers Asst)
> —That I'm looking for another job
> —I'm difficult to speak to
>
> In order for me to use the Servers Asst. as my personal butler, they would have to help me with things that affect my person such as cleaning my apartment, doing my laundry, etc. Asking them to assist me at work (such as bringing water to my tables) is a part of their responsibilities so therefore your comment was irresponsible and an unfair one to make.
>
> In this particular situation when the table walked out, I immediately reported to you that the bill was dropped and when I went back to retrieve payment which was shortly after, the customers had left leaving only $6 in the receipt book. It's unfortunate that they left without paying but the burden of responsibility is unfairly placed on me.
>
> As for disagreements between my coworkers and I, we were never called into a meeting to discuss a resolution to the problems. So speaking to Adderley about his lack of help on the floor when we need it (which the servers complained to management about), asking Rachel not to burden me with her personal problems while I'm at work and not tolerating Jonathan's abusive work tactics (which management tried to remedy by putting him to work at 48 lounge for most of his shifts as many other employees complained about him as well) is something I feel the right to defend myself from.
>
> As for me looking for another job, it is my right to do so. This was discussed with you because I asked you to no longer put me on the private events as our hourly rates were significantly lowered reducing our chances of making a fair amount of money as we normally would on the busy nights the events were held. You even voiced your disagreement to Brian when you were told that this decision would be taken.
>
> Again, before reducing my shifts, you did not even allow me the decency to communicate that you had issues with me. I feel you're personally holding a vendetta against me because I speak my mind on issues that affect us (the employees) and because of this, you've unfairly interfered with my financial stability.
>
> I've worked for this company from the beginning and management has always suggested an open line of communication in order for a smoother work environment but when we do, we're deemed troublemakers. You mentioned to me that I'm difficult to speak to yet we've always managed to communicate. You've not once had a problem speaking to me or me taking directions from you. However, since my last meeting that involved you, me, Aksentyeva and Brian, there's been a shift. And while you'll contest this argument, it shows in the decisions you made soon after. Such as reducing my days and even the hours during my shifts and no conscious or factual effort to the reasons you did so.
>
> I'm disappointed in the way you're treating me as an employ-

[19] Davis and Pinzon each testified credibly that other servers at the staff meeting nodded their heads in approval as Davis spoke of the various work issues. (Tr. 39, 104–105.) Rajak's testimony corroborated a portion of their contention: "And then she complained *on our behalf*, I heard her for the first time about the MetroCards. That was the first time that I heard it." (Tr. 221.)

[20] The recording confirms Pinzon's testimony that Quiñones' responses were curtailed. However, I did not credit her speculation that neither she nor others spoke up because of Quiñones' disposition or because Davis was the only one "strong enough" to do so. (GC Exh. 2 and 2(a); Tr. 104–105, 115, 134.)

ee. It's unfair and unjust way to say thank you to the ones that have always worked their hardest to help build your brand.[21]

H. Parkview's Decision to Terminate Davis

Daley informed Packin about the comments by Davis and other servers at the January 27 meeting relating to room temperature, their uniforms, party pay and healthcare benefits. He also informed Packin that he and Quiñones "offered a direct response *to all the staff that were there at the time."* (Emphasis supplied).[22] He also forwarded the January 27th email from Davis following the meeting in which she complained about a reduction in her scheduled work hours.[23]

Nothing happened until Daley informed Packin that Davis wanted to speak with him. Daley also mentioned that Davis complained about her reduced work schedule. That complaint was the proverbial straw that broke the camel's back and, on January 29, Packin informed Davis that she was terminated because she did not get along with management.[24]

Legal Analysis

I. APPLICABILITY OF *WRIGHT-LINE* TEST TO THE ALLEGATIONS

Susann Davis alleges that Parkview unlawfully terminated her employment because she complained about the terms and conditions of her employment, including wages, benefits, uniforms, footwear, schedules, transit benefits, and management's treatment of employees. Parkview argues that Davis' discharge resulted from her inability to work well with coworkers and management.

Section 8(a)(1) of the Act considers it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act. 29 U.S.C. § 158. The section 7 rights guarantee employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or mutual aid or protection." 29 U.S.C. §157.

In determining whether Davis was unlawfully discharged because she engaged in protected activity, the Board applies the test established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). The General Counsel must initially show the employee's protected activity was a motivating factor in the decision to terminate. See *Coastal Sunbelt Produce, Inc. & Mayra L. Sagastume*, 362 NLRB No. 126, slip op. at 1 (2015). Establishing unlawful motivation requires proof that: "(1) the employee engaged in protected activity; (2) the employer was aware of the activity; and (3) the animus toward the activity was a substantial or motivating reason for the employer's action." *Consolidated Bus Transit, Inc.,* 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009).

If the General Counsel prevails, the burden shifts to Parkview prove that it would have terminated Davis even in the absence of her protected concerted activity. 251 NLRB at 1089; *Manno Electric*, 321 NLRB 278, 281 (1996). An employer may not, however, prove this affirmative defense where the proffered reasons for discharge are merely pretextual. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007); *Brink's, Inc.*, 360 NLRB 1206, 1217 (2014) (noting that there is no need to perform the second part of the *Wright Line* analysis if the reasons for discharge are pretextual).

II. DAVIS ENGAGED IN PROTECTED CONCERTED ACTIVITY

Protected concerted activity was first defined by the Board as one which is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 268 NLRB 493 (1983) (*Meyers I*), cert. denied 474 U.S. 948 (1985), supplemented 281 NLRB 882 (1986) (*Meyers II*), cert. denied 487 U.S. 1205 (1988). The Board later broadened the scope of the definition to include "circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management. *Meyers Industries*, 281 NLRB 882, 887 (1986).

Davis engaged in protected concerted activity over the course of her employment with Parkview because she discussed with her coworkers issues related to the terms and conditions of their employment. She spoke up during a staff meeting called by management on January 27 and asked about workplace conditions and employment incentives. Davis, by her actions, essentially brought her group's complaints to management's attention. See *Kingman Regional Medical Center*, 363 NLRB No. 145, slip op. at 17 (2016) (protected concerted activity must be concerted and done so for mutual aid and protection).

A. The Activity was Concerted

Inquiry into whether the employee engaged in concerted ac-

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[21] This email was the only evidence of management mentioning to Davis about how she spoke to other servers. (GC Exh. 6.) Aside from a reference to her interaction with Torres, the email mentioned only that Davis asked Green not to burden her with her personal problems at work and spoke to Adderley about the need to help the servers on the floor. Neither of those employees testified.

[22] Daley conceded that he told Packin what Davis said at the meeting. (Tr. 193–194, 197–198.) Packin, who remained in the hearing room while Daley testified, had only a vague recollection of what was reported to him. (Tr. 363–364, 372.)

[23] The testimony by Packin and Daley regarding their conversation in which Packin decided to terminate was inconsistent and not credible. Packin referred to incidents that Davis had with Daley after the January 22nd meeting, but there is no credible evidence of anything other than her comments and email on January 27. (Tr. 358–364, 380–381.) Daley, on the other hand, testified that he recommended Davis be terminated based on service, attitude toward management, the lack of a productive work environment, and the incident with Aksentyeva, The credible evidence suggests, however, that it was Davis' grievance over her reduced work hours, as well as the common group concerns on January 27, that spurred his recommendation—and even then only because Packin requested it. (Tr. 193–194, 201–202.)

[24] I credit Davis' testimony that Packin never mentioned that her customer service was a reason for her termination. (Tr. 40, 362–363.) Packin, on the other hand, was vague and evasive when asked if Davis' service was a factor. Moreover, in his sworn affidavit statement, Packin failed to mention anything about Davis' service. (Tr. 378–379.) Lastly, in his prior sworn statement, Packin referenced an email by Daley that mentioned Davis' service issues. However, such an email was not produced. (Tr. 381–382.)

tivity is determined on the basis of the totality of circumstances, 363 NLRB No. 145 at 17 (2016) (citing *National Specialties Installations*, 344 *NLRB* 191, 196 (2005)). The idea of group action, however, does not have to be explicitly stated when the employees communicate, and discussions among coworkers suffice to find group action. See *Relco Locomotives, Inc.*, 358 NLRB 298, 314 (2012); See *Whittaker Corp.*, 289 NLRB 933, 934 (1988) (noting that especially in the context of a group meeting, a concerted objective can be inferred from the circumstances). Davis engaged in concerted activity by apprising management about the cocktail servers' complaints relating to working conditions and benefits. She and Pinzon talked to Green and Pradez about wages, hours, and benefits, as well as other conditions of employment. Cocktail servers often also discussed the cold temperature in the workplace, and Davis and Pinzon raised concerns over the decrease in the party pay-rate from $50 to $40. Additionally, during the January 27 staff meeting, in the presence of Daley and Quiñones, Davis raised employee concerns regarding transit card incentives, health benefits and cold room temperatures, as other servers nodded their heads in approval.

Parkview contends that Davis did not engage in concerted protected activity because her activities did not demonstrably link to group action—in other words, she acted on behalf of herself as a sole spokesperson. Parkview's contention that Davis acted individually, however, is neither supported by the facts nor Board law. In *Whittaker Corp*., 289 NLRB 933, 934 (1988), the Board dealt with a similar situation in which an employee brought matters, without discussing the matters with coworkers, to a group meeting called by management to discuss the suspension of annual wage increases. The Board found this discussion to constitute concerted activity within the meaning of the Act. See also *NLRB v. Caval Tool Division.*, 262 F.3d 184, 190 (2d Cir. 2001) (affirming the Board's conclusion that an employee engaged in concerted activity when he raised the issue of the company's new break policy at an employee meeting called by the employer). In addition, employees nodded their heads in approval as she shared an array of employee concerns at the January 27th staff meeting,

B. Davis Engaged in the Activity for the Purpose of Mutual Aid or Protection

Davis' grievances discussed with coworkers were "indispensable initial steps" towards group action. 363 NLRB No. 145 at 18 (2016) (citing *Hispanics United of Buffalo*, 359 NLRB 368, 370 (2012) enfd. 734 F.3d 764 (8th Cir. 2013). Even if the employees do not authorize another employee to act as a spokesperson, the protection remains in place. 363 NLRB No. 145, slip op. at 18 (2016) (citing *NLRB v. City Disposal Systems,* 465 U.S. 822, 835 (1984)). Davis's concerns relating to wages, benefits, work attire and supervisors' treatment of employees, prior to and during the meeting sought to improve the general conditions of employment for other employees. As such, those concerns advanced the "mutual aid or protection" of all of the cocktail servers even if, as Parkview argues, others did not expressly share those concerns. See *Fresh & Easy Neighborhood Market,* 361 NLRB 151, 154 (2014) (activity was for the purpose of mutual aid or protection when "there is a link between employee activity and matters concerning the workplace or employees' interests as employees").

C. Davis' Behavior Did Not Result in a Loss of Section 7 Protection

Parkview argues that even if Davis' action was concerted, her use of abusive language and aggressive behavior extinguished her Section 7 protection. Specifically, Parkview cites Davis' conversation with Torres and her frequent interruptions during the January 27th meeting as the basis for a loss of protection. Davis' behavior was, at times, disruptive—specifically with respect to Torres. However, her actions do not strip her of Section 7 protections. The Board has consistently used a 4-factor test in determining whether communication between an employee and a manager or supervisor in a workplace is so derogatory that it causes the employee to lose protection of the Act. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). The four factors are: (1) the place of discussion; (2) the subject matter of the discussion; (3) the nature of the outburst; and (4) whether the outburst was provoked by the employer's unfair labor practice. Id.

Regarding her incident with Torres, during which she wished him death, she did so as she was clocking out of work, presumably outside of the work area. This factor favors Davis, and though abhorrent, it did not result in a disruption of the workplace. Nor did it undermine management's authority. *Stanford Hotel*, 344 NLRB 558 (2005) (highlighting that the workplace outburst occurred away from the normal working area in a closed door meeting where no other employees were present, and did not weaken management's authority). Additionally, even management was aware of the problems that other employees had with Torres' supervisory style. Secondly, the substance of the discussion, while it did not relate to her protected concerted activity, was nonetheless an expression of Davis' concern about working conditions. Thus, this factor also weighs in favor of Davis. Finally, the nature of the outburst was short and occurred as Davis was clocking out. Even though the outburst was not motivated by an unlawful labor practice, the other factors tilt in favor of Davis and she therefore retains the protection of the Act.

III. PARKVIEW'S KNOWLEDGE OF DAVIS' ACTIVITIES

It is undisputed that Parkview management was aware of Davis' complaints about room temperature, uniforms, wages and supervisory treatment of employees, and responded to those concerns on January 22 and 27, as well as other times. Parkview contends, however, that Packin lacked knowledge of the protected concerted activity because he was not at either meeting. As to the concerns expressed by Davis in her emails to Packin, Parkview argues that Davis voiced only individual concerns.

Packin was generally aware of Davis' activities as they related to communications with several managers. See, e.g., *Dobbs International Services*, 335 NLRB 972, 973 (2001); *State Plaza, Inc.*, 347 NLRB 755, 756 (2006) (imputing knowledge of the agent to the respondent, while giving the respondent an opportunity to rebut that showing). It is also reasonable to infer, especially given Parkview's medium-sized workforce,

that Davis's discussions with coworkers were already known to Packin. See *T-Mobile USA, Inc.*, 365 NLRB No. 15, slip op. at 2 (2017) (citing *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 983 fn. 36 (2007), enfd. in relevant part 570 F.3d 354 (D.C. Cir. 2009) (knowledge of protected concerted activity can be established by reasonable inference). In addition, Davis expressed her concerns about supervisory treatment of servers directly to Packin at and before the January 22nd meeting. Finally, she raised a host of work-related issues, including party pay, temperature, footwear, and benefits at the January 27th meeting to Daley and Quiñones, who said they would relay those concerns to Packin. Daley briefed Packin after the meeting and let him know about Davis' concerns.

IV. WHETHER THE DISCHARGE WAS MOTIVATED BY ANIMUS

Davis had a positive relationship with management early in her tenure at Parkview. She later began to discuss workplace issues with other workers. Her relationship with Torres, who was promoted from busboy to an assistant manager, was rocky. Other employees, however, also had difficulty with Torres' supervisory style, which management was certainly aware of. Davis received one disciplinary notice regarding her service of tables, but her work performance improved. Her relationship with the lead bartender was also strained, but aside from one instance in which he complained about all of the servers, none of that led to discipline.

Subsequently, Davis had an argument with Aksentyeva, the floor manager, but that incident was resolved in a meeting on January 22. At that meeting, in which Aksentyeva apologized, Packin explained that he wanted to handle things internally and not hear of things via email from Davis or the other staff members. Davis expressed to the managers that she was speaking on behalf of other employees, but was condemned whenever she speaks her mind. At the end of the meeting, Davis was assured that her employment was not in jeopardy and her customer service excellence was acknowledged by Packin. At the hearing, Packin also conceded that he did not plan on discharging Davis at the meeting. On January 25, Davis emailed Daley about a change in her work schedule that occurred after the January 22nd meeting. Daley responded that he needed to see a change and improvement in her service, and that the reduction in hours was unrelated to the schedule change. However, his reply stood in stark contrast with managers' remarks at the January 22 meeting, when Davis' service was commended.

On January 27, during a staff meeting, Davis raises group concerns and also met afterwards with Daley to discuss the schedule change. Daley relayed Davis' comments from the meeting to Packin and forwarded an email in which Davis detailed the conversation she had with Daley after the staff meeting. Daley informed Packin that Davis wished to speak with him, and Packin informed her of her discharge, citing a failure to get along with management.

The General Counsel has to establish that the protected activity was a "substantial or motivating factor" in the decision to discharge Davis. *Brink's, Inc.*, 360 NLRB 1206, 1216 (2014). Evidence of animus, however, can be inferred from the entirety of the record, looking to circumstantial evidence and where available, direct evidence. See, e.g., *Frierson Bldg. Supply Co.*, 328 NLRB 1023, 1023–1024 (1999). In *Alternative Entertainment, Inc*, 363 NLRB No. 131 (2016), enfd. 858 F.3d 393 (6th Cir. 2017), an employee engaged in protected concerted activity by discussing concerns about a change in the wage structure with other coworkers. Management knew about his protected activity, pulled him aside and asked that he refrain from discussing this issue with other workers. Shortly thereafter, the discriminatee was fired. The Board observed that the timing of the discharge, in the absence of direct evidence, provided "strong circumstantial evidence" of not only knowledge of continued engagement with a protected activity, but also of a discriminatory motive. Id. The Board went on to note that a vague pretextual explanation for discharge was "even stronger" evidence that a discriminatory motive prompted the discharge. Id. Among common indicators of animus are a showing of "suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employee." *Relco Locomotives, Inc.*, 358 NLRB 298, 311 (2012).

In Davis' case, the timing sheds serious doubt on whether her failure to get along with management was a bona fide consideration in the discharge decision. Parkview has not satisfactorily shown that Davis' relationship with management—so soon after the January 22 meeting where she was assured of job safety—deteriorated to the extent that it merited discharge. What stands out is Davis' increased assertiveness in voicing group concerns such as transit and health benefits during a staff meeting. As such, it is evident the discharge was motivated by her increased amount of protected activity, rather than a sudden change in the relationship after the January 22 meeting. This indicates that the reason offered by Parkview for Davis' discharge, namely, that she did not get along with management, is pretextual, and therefore unlawfully motivated. This conclusion negates the defense that Parkview would have terminated Davis in the absence of her protected activity. *See Coastal Sunbelt Produce*, 362 NLRB No. 126, slip op. at 2 (2015) (ruling that the employer's use of a pretextual reason defeats the employer's affirmative defense that it would have discharged the employee in the absence of union activity).

In addition to the suspicious timing, the proffered reason for the discharge is weak. Parkview tolerated Davis' slights towards supervisors several months and continued to commend her strong service until a week before her discharge. At that time, there were absolutely no seeds planted in furtherance of a discharge. To the contrary, it was Daley's report of his conversation and email exchange with Davis that led Packin to decide to discharge her a day or two later because she complained about scheduling. He alluded to the problem as difficulty in scheduling Davis, but there was no evidence that she presented any scheduling problems at any time after the January 22nd meeting. The fact that there was no discernible late-breaking scheduling problem establishes that he Packin terminated Davis because of grievances she conveyed to Daley on January 28.

Parkview cites *NLRB v. Starbucks Corp.*, 679 F.3d 70, 81 (2d. Cir. 2012), for the proposition that an employer may fire a competent employee for cause where that employee fails to abide by its employment policies. However, no such policies

were received in evidence.

Davis' discharge was motivated by Parkview's animus towards her engagement in the protected concerted activity because Davis was terminated shortly after expressing, in agreement with other employees, shared group concerns. Additionally, the reasons offered for discharge were vague and warranted an inference that the discharge was motivated by an animus toward her protected activity.

Under the circumstances, Parkview violated Section 8(a)(1) of the Act by unlawfully discharging Susann Davis because she engaged in protected concerted activity by advocating employee concerns about wages, benefits, work clothing and supervisors' treatment of cocktail servers.

CONCLUSIONS OF LAW

1. The Respondent, Parkview Lounge LLC, d/b/a Ascent Lounge, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by terminating Susann Davis because she engaged in concerted protected activities.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent unlawfully discharged Susann Davis, we shall order the Respondent to offer her full reinstatement to her former job or, if that job no longer exists, to a substantially similar position, without prejudice to her seniority or any other rights or privilege previously enjoyed, and to make her whole for any loss of earnings and other benefits suffered as a result of his discharge. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, we shall order the Respondent to compensate Susann Davis for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. See *AdvoServ of New Jersey, Inc*., 363 NLRB No. 143 (2016).

In accordance with the Board's decision in *King Scoopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent must also compensate Susann Davis for her search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

The Respondent, Parkview Lounge LLC, d/b/a Ascent Lounge, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for engaging in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Susann Davis full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Susann Davis whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

(c) Compensate Susann Davis for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 2 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Susann Davis, and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix.[26] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically,

[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 29, 2016.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 22, 2017

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Susann Davis full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Susann Davis whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Susann Davis for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Susann Davis, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

PARKVIEW LOUNGE, LLC, D/B/A ASCENT LOUNGE

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02–CA–178531 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.